

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA; THE
STATE OF NORTH CAROLINA; AND
THE COMMONWEALTH OF
VIRGINIA, SECRETARY OF
NATURAL RESOURCES,

Plaintiffs,

v.

DUKE ENERGY CAROLINAS, LLC,

Defendant.

CIVIL ACTION NO. 1:19-cv-707

COMPLAINT

Plaintiffs, the United States of America (“United States”), by authority of the Attorney General of the United States, on behalf of the Secretary of the United States Department of the Interior (“DOI”), through the United States Fish and Wildlife Service; the State of North Carolina (“North Carolina”), through the North Carolina Department of Environmental Quality; and the Commonwealth of Virginia (“Virginia”), through its Secretary of Natural Resources and the Virginia Department of Environmental Quality, file this Complaint and allege as follows:

NATURE OF THE ACTION

1. This is a civil action brought by Plaintiffs pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9607(a), for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or

loss, resulting from the release of hazardous constituents of coal ash when liquefied coal ash spilled into the Dan River on February 2, 2014, at and from the Dan River Steam Station near Eden, Rockingham County, North Carolina.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the parties and subject matter of this action under 28 U.S.C. §§ 1331, 1345, and 1367(a) and under Sections 107(a) and 113(b) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(b).

3. Venue is proper in the Middle District of North Carolina pursuant to 28 U.S.C. §§ 1391(b) and (c) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), because the release and resulting injury and damages originated in this judicial district and because Defendant resides in this judicial district.

PARTIES

4. Under Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), and 40 C.F.R. § 300.600, Plaintiff United States is a trustee for natural resources impacted by the release.

5. Under Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), and 40 C.F.R. § 300.605, Plaintiff North Carolina is a trustee for natural resources in North Carolina impacted by the release.

6. Under Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), and 40 C.F.R. § 300.605, Plaintiff Virginia is a trustee for natural resources in Virginia impacted by the release.

7. Defendant Duke Energy Carolinas, LLC (“Duke Energy”) is a Delaware corporation with its principal place of business in North Carolina.

GENERAL ALLEGATIONS

8. Duke Energy is the owner and operator of the area encompassing a former coal-fired power plant, including its coal ash basins (collectively referred to as “Dan

River Steam Station”). Dan River Steam Station is located along the Dan River near Eden, Rockingham County, North Carolina.

9. On February 2, 2014, a stormwater pipe underneath the primary coal ash basin at the Dan River Steam Station failed, resulting in the spill of approximately 27 million gallons of coal ash wastewater and between 30,000 and 39,000 tons of coal ash into the Dan River (hereinafter referred to as the “Dan River Coal Ash Spill”).

10. The Dan River flows through both North Carolina and Virginia. It runs approximately 214 miles, beginning in Patrick County, Virginia and running east into Rockingham County, North Carolina. The Dan River ends at Kerr Lake Reservoir located along the northern border of North Carolina and the southern border of Virginia at its confluence with the Roanoke River.

11. Coal ash is a gray powdery byproduct of burning coal to produce energy and is composed of materials remaining after coal is burned, including silica, unburned carbon, and various trace metals such as arsenic, boron, cadmium, chromium, copper, lead, mercury, nickel, selenium, and zinc.

12. In the days immediately following the Dan River Coal Ash Spill, coal ash and/or ash-like material comingled with native sediment was found as far as 70 miles downstream of the Dan River Steam Station.

13. Natural resources and associated services that have been or may have been injured as a result of the Dan River Coal Ash Spill include stream and wetland habitat, surface water and sediment, aquatic biota, migratory birds, and human recreational uses.

14. As natural resource trustees, Plaintiffs conducted natural resource damage assessment activities, including reviewing data from the spill response efforts, to assess injuries to natural resources at and downstream of the Dan River Steam Station to where the coal ash came to be located; prepared a natural resource damage assessment plan; solicited input from the public and interested stakeholders on the scoping document for

restoration planning; considered restoration project proposals submitted by the public; and determined the type and magnitude of restoration needed to bring injured natural resources to the appropriate baseline condition and to address the public's loss of natural resource services for the period preceding restoration to baseline.

15. Based on information developed and analyzed as part of their assessment activities, Plaintiffs determined that the concentrations of hazardous substances (e.g., arsenic, selenium, and zinc) in surface water and sediment of the Dan River were at levels sufficient to cause injury to fish and other aquatic biota.

16. Data from samples from the coal ash basin, nearby ash/native sediment deposit, and surface waters in the Dan River indicated that levels of contaminants of potential concern following the Dan River Coal Ash Spill exceeded levels that are known to cause harm to ecological receptors, as described further in Paragraphs 17 and 18.

17. Preliminary assessment of the water samples showed that North Carolina's water quality standards for turbidity, copper, selenium, and iron and Virginia's water quality standards for selenium were exceeded, which meets the definition of injury under the CERCLA Natural Resource Damage Assessment and Restoration regulations at 43 C.F.R. § 11.62(b)(iii). Preliminary assessment of the water samples also showed that the United States Environmental Protection Agency's ("EPA") Criterion Maximum Concentration for zinc and Criterion Continuous Concentrations for lead, zinc, and selenium were exceeded.

18. Preliminary screenings of the sediment samples showed that EPA's, North Carolina's, and Virginia's standards for arsenic and selenium were exceeded.

19. Reconnaissance between the Dan River Steam Station and the Kerr Lake headwaters identified a coal ash bar approximately 75 feet long and 15 feet wide that contained up to five feet of ash or ash/sand mix. Traces of ash were identified all the way

downstream to Kerr Lake. The ash deposition exposed benthic organisms to suspended or dissolved hazardous substances.

20. As a result of the Dan River Coal Ash Spill, the Abreu Grogan Park located in Danville, Virginia was closed to public use during the removal of a coal ash deposit in the river in the vicinity of the Schoolfield Dam between April 1, 2014, and August 1, 2014.

21. As a result of the Dan River Coal Ash Spill, a recreational water advisory was in place in North Carolina between February 12 and July 22, 2014, and a fish consumption advisory was in place in Rockingham and Caswell Counties in North Carolina between February 12, 2014, and November 29, 2017.

22. Based on their assessment activities, Plaintiffs determined that the release of hazardous substances resulting from the Dan River Coal Ash Spill injured or may have injured migratory birds, fish, aquatic insects, freshwater mussels, reptiles, amphibians, surface water, and sediment of the Dan River; human use of the Dan River; and general supporting habitat for all of these resources.

23. Plaintiffs have determined natural resource damages based on the implementation of restoration projects to restore, rehabilitate, replace and/or acquire the equivalent of the injured natural resources and lost services alleged to have occurred as a result of the exposure to elevated concentrations of hazardous substances arsenic and selenium in surface water and/or sediment.

24. Plaintiffs have prepared a Draft Restoration Plan in accordance with 42 U.S.C. § 9611 and 43 C.F.R. § 11.93 to evaluate and select proposed restoration alternatives that will restore, rehabilitate, replace, and/or acquire natural resources and services equivalent to those allegedly injured, lost, or destroyed as a result of the Dan River Coal Ash Spill. Plaintiffs will receive public comments on the Draft Restoration

Plan for a period of at least 45 days and will hold informational meetings about the Draft Restoration Plan in communities near the location of the Dan River Coal Ash Spill.

25. Plaintiffs have incurred natural resource damage assessment costs as a result of the release of hazardous substances resulting from the Dan River Coal Ash Spill.

26. Plaintiffs have incurred, and will continue to incur, costs for restoration planning, implementation and monitoring related to the oversight and implementation of the Restoration Plan.

CLAIM FOR RELIEF: CERCLA SECTION 107(A)

27. Paragraphs 1-26 are realleged and incorporated by reference.

28. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in relevant part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility

. . . shall be liable for . . .

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release [of a hazardous substance]

29. Duke Energy is an “owner or operator” within the meaning of Section 101(20) of CERCLA, 42 U.S.C. § 9601(20).

30. Duke Energy is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

31. The Dan River Steam Station is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

32. Certain constituents of coal ash—arsenic and selenium—are “hazardous substances” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

33. As a result of the Dan River Coal Ash Spill, there was a “release” of hazardous substances into the environment, within the meaning of Sections 101(22), 101(29), and 107(a) of CERCLA, 42 U.S.C. §§ 9601(22), 9601(29), and 9607(a).

34. Duke Energy is an “owner or operator” of a “facility” within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

35. Injury to, destruction of, or loss of “natural resources” under the trusteeship of Plaintiffs—including fish, birds, amphibians, sediment, and invertebrates—resulted from the Dan River Coal Ash Spill within the meanings of Sections 101(16) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(16) and 9607(a).

36. Plaintiffs have incurred, and will continue to incur, costs in assessing the injury to, destruction of, or loss of natural resources resulting from the Dan River Coal Ash Spill from Duke Energy’s Dan River Steam Station facility.

37. Duke Energy is liable to Plaintiffs for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss, resulting from the Dan River Coal Ash Spill from Duke Energy’s Dan River Steam Station facility.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Enter judgment in favor of Plaintiffs against Duke Energy for liability pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for damages to, destruction of, or loss of natural resources resulting from the Dan River Coal Ash Spill, including the reasonable costs of assessing such injury, destruction, or loss resulting from the Dan River Coal Ash Spill; and

(2) Award Plaintiffs such other and further relief as this Court may deem appropriate.

Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

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